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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NUMBER 557

A. C. PARK,
Petitioner

vs.

THE STATE OF GEORGIA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

A. C. Park petitions this Court for a writ of certiorari to review the judgment and opinion of the Supreme Court of Georgia entered in the case of *A. C. Park v. The State of Georgia* on the 2nd day of July, 1968.

OPINIONS BELOW

The opinion and judgment of the Supreme Court of Georgia are as yet unreported but are appended hereto, (Appendix) and unofficially reported in 162 S.E.2d 359, (advance sheet of Sept. 12, 1968.)

JURISDICTION

The judgment of the Supreme Court of Georgia was

dated and entered on July 2, 1968. A rehearing in said judgment was denied by the Supreme Court of Georgia on July 16, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3) since a right, privilege and immunity is specially claimed under the Constitution of the United States.

QUESTION PRESENTED FOR REVIEW

The question presented is whether the admission of testimony by state witnesses as to extrajudicial hearsay declarations made out of court by alleged conspirators and other persons not on trial and made out of the presence of, and tending to inculpate, the accused violates the accused's constitutional right to be confronted by the witnesses against him as guaranteed by the Sixth Amendment to the United States Constitution and whether the consideration of such hearsay declarations as original evidence by a State court deprives accused of due process of law as guaranteed by the Fourteenth Amendment thereto.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment Six of the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him."

Amendment Fourteen of the Constitution of the United States provides:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF CASE

Petitioner, A. C. Park, was indicted, along with Douglas Pinion, J. H. Blackwell, Lloyd George Seay and George Iras Worley, by the Grand Jury of Jackson County, Georgia for the murder of Floyd Hoard by the use of dynamite and other explosive substances.

Floyd G. Hoard was the duly qualified and elected Solicitor General of the Piedmont Judicial Circuit and resided near Jefferson in Jackson County. During the early morning hours between 7 and 7:30 A.M. on August 7, 1967, Mr. Hoard left his home and as he got into his 1967 Ford to start the ignition the vehicle exploded as a result of dynamite that had been wired to the ignition system of the car, thereby causing his death within a few minutes thereafter.

After an investigation of about 4 months, the Jackson County Grand Jury indicted A. C. Park, the petitioner, and the other four persons as stated. Four of them, including petitioner, were in custody at the time of petitioner's trial in January, 1968, having been held incommunicado from each other since their arrest.

On the separate trial of A. C. Park it was shown by the State that defendant Lloyd Seay, J. H. Blackwell and George Worley together purchased the dynamite and wired it to the car. Worley did not testify, but Blackwell and Seay both testified as witnesses for the State. No direct evidence was offered against petitioner and Blackwell never mentioned petitioner's name.

Seay had no personal or direct dealings with petitioner, but was permitted to testify over objection that Pinion had paid him $5,500.00 to kill Hoard, and that

on one occasion Pinion stated to the witness that "the old man wouldn't go up any more." Seay then testified over further objection that he understood Pinion meant A. C. Park when he referred to "the old man." Seay was also permitted to testify over further objection that Worley had on one occasion told him "the old man" would have something done to him or his family if he didn't go through with the killing.

Almost all the other evidence for the State concerned activities involving the sale of liquor and beer by the petitioner and the efforts of Hoard to prosecute him for it.

No other evidence tending to connect petitioner with the murder, or with any conspiracy to murder, was introduced. Petitioner moved to exclude each and every one of these hearsay declarations at the conclusion of the testimony for the State, but was overruled each and every time. A motion for directed verdict was made by petitioner and overruled by the court.

Petitioner was found guilty by a jury and sentenced to be electrocuted. An appeal was taken to the Georgia Supreme Court setting out 20 enumerations of error. The first and second enumerations of error concerned themselves with the sufficiency of the evidence to support the verdict, the next seventeen enumerated errors complained of the trial court's rulings permitting hearsay evidence and conclusions based on hearsay to be allowed in evidence to support the verdict, and the last enumerated error involved the refusal of the trial court to grant defense counsel the opening and concluding argument to the jury.

The Supreme Court of Georgia sustained the last

enumeration of error, thereby reversing the judgment of the trial court with direction to grant a new trial because of the failure of the trial court to allow defense counsel the opening and concluding argument to the jury, but held all the hearsay evidence to be admissible and sufficient to authorize a guilty verdict, and thus overruled the first nineteen enumerations of error, the first of which would have authorized an absolute reversal of the conviction, if it had been sustained, and if the hearsay had been eliminated.

A motion for rehearing was made by petitioner on six grounds, five of them being non-federal and one of which concerns this petition for certiorari, to-wit: the federal ground that petitioner was denied the right to be confronted by the witnesses against him and was denied the right of cross-examination, in violation of the Sixth Amendment to the United States Constitution.

The Georgia Supreme Court denied the motion for rehearing without opinion.

MANNER OF RAISING FEDERAL QUESTION

In ground #3 of the motion for rehearing before the Georgia Supreme Court (R. 784,) petitioner pointed out to that Court that their ruling, holding State witness Seay's testimony as to the declarations made to him by Pinion that "the old man won't go up any more" and other hearsay declarations inculpating petitioner, to be admissible were contrary to the holding by this Court in *Bruton v. U. S.*, No. 705, October Term, 1967, decided May 20, 1968. (88 S.Ct. 1620)

Enumerations of error #3 through #19, filed in the Georgia Supreme Court at the time of filing the briefs

therein, (R. 734, 738,) in accordance with the practice of that Court, complain of the admission into evidence of various hearsay testimony of a similar nature and conclusions of the witness attempting to interpret the meaning of such hearsay declarations.

All of the hearsay declarations were objected to in the trial court when they were offered and motions to exclude were made at the close of the evidence for the State. (R. 660-676.)

SUMMARY OF REASONS FOR ALLOWANCE OF WRIT

1.

The decision of the Georgia Supreme Court is contrary to the decisions of this Court in

BRUTON V. UNITED STATES

_____ U. S. _____ (88 S.Ct. 1620), and

ROBERTS V. RUSSELL

_____ U. S. _____ (88 S.Ct. 1921.)

2.

Under Georgia law, the decision will become the law of the case and binding on the trial court and appellate courts in a future trial, even though wrong.

3.

The question involved is of gravity and importance in the administration of the criminal laws in all State and federal trials as regards the right of a defendant to be confronted with the witnesses against him in a criminal case.

ARGUMENT OF REASONS FOR ALLOWANCE OF WRIT

1.

DECISION CONTRARY TO BRUTON v. U. S.

This Court is not being called upon to decide the sufficiency of the evidence to support the verdict. This is a matter that we concede must be left to the State Courts to decide. However, the Supreme Court of Georgia, in reaching a determination that the evidence "as a whole" was sufficient to support the verdict, considered the unconstitutional testimony of the co-defendant, Seay, as to a conversation had with co-defendant Pinion relating extrajudicial statements of opinions by Pinion and Worley inculpating the accused, and such evidence should have been eliminated in the consideration of the sufficiency of the evidence, by the Georgia Supreme Court.

Petitioner is entitled to be confronted with the witnesses against him, including the right to cross examine them.

BRUTON V. UNITED STATES
_____ U. S. _____ (86 S.Ct. 1620).

ROBERTS V. RUSSELL
_____ U. S. _____ (86 S.Ct. 1921.)

In this case petitioner was found guilty of a serious murder charge by a rural jury in a small community of North Georgia. The victim was a high public official, the Solicitor General of that Circuit and an elected official under Georgia law.

Petitioner was 76 years of age and was placed on trial

less than 30 days after the indictment was returned. On the same day that the verdict was returned petitioner was sentenced by the Court to death by electrocution. An appeal was taken to the Georgia Supreme Court. After summarizing the evidence that Court found that "this defendant did not commit the act itself and was not actually present at the scene when others committed it." (R. 752)

The only really damaging evidence in the record which tends to connect the petitioner with a conspiracy to commit the murder is that given by co-defendant Seay, wherein he was permitted to testify that Pinion, another co-defendant *who was available to the State as a witness* but was not used, told him that "the old man wouldn't go up any more," and that after the killing Pinion told him "the old man was worried," and that Worley, another co-defendant who did not testify, stated to Seay that if he didn't go through with the murder "the old man" would have something done to him or his family.

The Georgia Supreme Court held all of these declarations to be admissible, and sufficient with the other evidence in the case to take away the life of the accused.

The decision of the Georgia Supreme Court in this case is contrary to *Bruton v. U. S.*, supra, where it was held:

> "Plainly, the introduction of Evans' (co-defendant) confession added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross examination, since Evans did not take the stand. Petitioner thus was denied his constitutional right of confrontation."

This case presents to this Court an even more flagrant violation of the Confrontation Clause than in *Bruton,* because there the trial judge instructed the jury to disregard the extrajudicial confession of the co-defendant insofar as it inculpated the non-confessor, whereas here the extrajudicial declaration of the co-defendant was admitted into evidence *against* the defendant on trial, to be considered by the jury *as evidence against* the defendant on trial, and accepted as proof of its truthfulness by the Supreme Court of Georgia in passing upon the sufficiency of *the evidence as a whole* to support a verdict which would authorize the death penalty under Georgia law.

This case is also contrary to

ROBERTS V. RUSSELL

---------- U. S. ---------- (88 S.Ct. 1921,)

where this Court held:

> "Although *Bruton* involved a federal prosecution and this is a State prosecution, the right of cross-examination secured by the Confrontation Clause of the Sixth Amendment is made applicable to the States by the Fourteenth Amendment."

This decision also held that *Bruton* "is to be applied retroactively."

The decision of the Georgia Supreme Court is also contrary to

BROOKHART V. JANIS

384 U. S. 1 (86 S.Ct. 1245,) where

this Court remanded a habeas corpus to the Supreme Court of Ohio because the State court permitted the prosecution to introduce in evidence against him an

out-of-court alleged confession of a co-defendant and denied him the right of cross-examination.

The decision of the Supreme Court of Georgia is contrary to

BARBER V. PAGE, WARDEN
..... U. S. ..... (88 S.Ct. 1318) where

this Court, in a unanimous decision, reversed a State conviction on the basis of the Confrontation Clause because the principal evidence against the accused consisted of the reading of a transcript of the testimony of a witness given at a preliminary hearing and the State had not attempted to seek the witness' presence.

The facts of this last case are analogous to the case at bar because here the State had Pinion, the co-defendant, in custody. Yet the State chose to use Seay to testify as to the out-of-court declaration of Pinion tending to inculpate the petitioner. Had Pinion testified as a witness, he would have been subject to cross-examination by counsel for petitioner. As matters stood, however, his right of cross-examination was lost.

Petitioner should have had the right to cross-examine Pinion as to this declaration so that the jury might know if the declaration had any basis in fact, or whether it was false.

The Georgia Supreme Court's decision in this case is contrary to that of

DOUGLAS V. ALABAMA,
380 U. S. 415 (85 S.Ct. 1074,)

wherein two defendants were tried separately for armed robbery. Douglas' co-defendant was tried first and con-

victed. When Douglas was tried the State called the co-defendant as a witness, and attempted to prove a confession by him inculpating Douglas. The witness refused to answer and the State's Attorney was permitted to read the statement to him. The State then put police officers on the stand to prove the statement was made. This Court ruled:

> "Loyd (the co-defendant) could not be cross-examined on a statement imputed to but not admitted by him. Nor was the opportunity to cross-examine the law enforcement officers adequate to redress this denial of the essential right secured by the Confrontation Clause. Indeed, their testimony enhanced the danger that the jury would treat the Solicitor's questioning of Loyd and Loyd's refusal to answer as proving the truth of Loyd's alleged confession. But since their evidence tended to show only that Loyd made the confession, cross-examination of them as to its genuineness could not substitute for cross-examination of Loyd to test the truth of the statement itself."

The case at bar is similar. Seay testified about conversations with Pinion and Worley. The content of those conversations inculpated the petitioner. Seay's testimony tended to show only that Pinion and Worley made the declarations, not that they were true. Therefore cross-examination of Seay as to the genuineness of the declarations could not substitute for cross-examination of Pinion and Worley to test the truth of the statements themselves.

This is an extremely important question in the administration of the criminal law in this country. Far too many instances of this flagrant abuse of the denial of confrontation are being used by overzealous prosecutors

more bent on securing convictions than maintaining justice. Exceptions to the hearsay rule may have been born out of necessity or convenience to attest to some collateral or harmless issue, but to make out of it a Frankenstein monster by permitting the prosecution to dispense with the witness having knowledge of the facts by substituting one who is shielded from cross-examination as to the truth is to make a mockery of the Sixth Amendment.

2.

DECISION WILL BE LAW OF THE CASE

Although the judgment of the Georgia Supreme Court is one of reversal, it is not an absolute reversal but one with direction to grant a new trial. The petitioner sought an *absolute reversal* by his first enumeration of error complaining of the trial court's failure to direct a verdict of not guilty.

Under Georgia law an enumeration of error assigning error on the failure of the trial judge to grant a motion to direct a verdict of not guilty in a criminal case brings the sufficiency of the evidence under review.

SUTTON V. STATE

223 Ga. 313 (154 S.E.2d, 578.)

Furthermore, under Georgia law, the law of the case rule prevails.

BRYANT V. STATE

197 Ga. 641 (30 S.E.2d, 259,)

holds as follows:

> "Where a former decision has been rendered by this court in the same criminal case, on its subsequent

appearance this doctrine has been applied where the evidence shows substantially the same facts."

Under the ruling of the Georgia Supreme Court in this case the decision not to sustain the enumerations of error regarding the sufficiency of the evidence or the admission of the hearsay declarations will be the law of the case and binding both on the trial court on a new trial and the appellate court in the event of another appeal. The decision of the Supreme Court will be on a non-federal basis and this court will be without jurisdiction to review it.

DURLEY V. MAYO

351 U. S. 277 (76 S.Ct. 806.)

CONCLUSION

The Georgia Supreme Court's decision and judgment in not granting an absolute reversal and in not holding the hearsay testimony of Seay regarding the declarations by Pinion and Worley to be constitutionally inadmissible should either be reversed, or the opinion of the Georgia Supreme Court should be vacated for such further opinion and decision in the light of *Bruton v. U. S.*, supra.

This conclusion is reached because the Georgia Court, in determining the sufficiency of the evidence to support the verdict, based its decision on the *"evidence as a whole,"* thus failing to eliminate from the Court's consideration that evidence which was admitted by the trial court in violation of the Confrontation Clause.

We have no way of knowing what the Georgia Supreme Court will determine as to the sufficiency of the evidence if the hearsay is ordered eliminated, but peti-

tioner is entitled to a determination free from the taint of illegally admitted evidence which has been introduced in violation of the Confrontation Clause of the Constitution.

The judgment of the Georgia Supreme Court should be vacated and the case remanded to that Court for further proceedings so that they may reevaluate the evidence, by eliminating any consideration of the constitutionally inadmissible hearsay declarations.

Respectfully submitted,

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APPENDIX

In the Supreme Court of Georgia

24588. PARK v. THE STATE

1. The testimony of certain witnesses was not subject to the objections of hearsay and conclusion.

2. (a) A conspiracy involving the defendant in the murder was prima facie shown by evidence aliunde the declarations of a co-conspirator.

(b) Therefore, such declarations were admissible.

3. It was proper to overrule the motion for a directed verdict of not guilty based upon the grounds (a) that there was no evidence connecting the defendant with a conspiracy to murder the victim, and (b) that the testimony of an accomplice was not corroborated.

4. It was error to deny the defendant the opening and concluding argument to the jury, since he introduced no evidence.

GRICE, Justice. This appeal is from a verdict of guilty of murder without a recommendation of mercy and a sentence of death by electrocution. The appellant A. C. (Cliff) Park was indicted jointly with George Douglas Pinion, John Hyman Blackwell, Lloyd George Seay and George Iras Worley by the grand jury of Jackson County for the murder of Floyd G. Hoard by the use of dynamite and other explosive substances on August 7, 1967.

Between 7:00 and 7:30 a.m. on that date, Hoard, then the Solicitor General of the Piedmont Judicial Cir-

cuit which includes Jackson County, got into his automobile which was parked at his home, and when he attempted to start the ignition the car exploded as the result of dynamite that had been wired to the ignition system. His death was almost immediate.

Park entered a plea of not guilty and was tried separately. Objections to the admissibility of certain evidence and also motions to exclude specified admitted evidence were overruled. Because of the State's contention that he had introduced evidence, he was not permitted to make the opening and concluding arguments to the jury. Upon the conclusion of the State's evidence and his unsworn statement denying any connection with the homicide, the defendant Park moved for a directed verdict of not guilty, which was overruled. The foregoing rulings are the subject matter of his enumerations of error.

From the 20 enumerations of error the following four broad issues emerge: (1) Were certain items of testimony admissible? (2) Was the evidence sufficient to submit to the jury the question of whether the defendant was a participant in a conspiracy to murder Hoard? (3) Did the evidence sufficiently corroborate the testimony of an accomplice to the murder? and (4) Was the defendant entitled to the opening and concluding argument to the jury?

The evidence as to events leading up to the homicide, insofar as essential here, is that which follows.

About the latter part of March, 1967, Solicitor General Hoard was concerned about the illegal sale of alcoholic beverages being made from a garage at the residence of the defendant Park and also from a building

owned by him and known as "the yellow house," both located in Jackson County, where the sale of alcoholic beverages was not legal. There was evidence that since 1965 Park and the co-indictee Pinion had worked together in such sales. In late March Hoard began an investigation of these sales. This investigation was begun without telling local sheriff Perry, but later Hoard apparently informed him.

Hoard obtained the assistance of an agent of the Georgia Bureau of Investigation, and in turn other law enforcement personnel were brought in. Several of these men made purchases at the above named places in order to obtain evidence for a contemplated padlock proceeding. One testified that "this was an open operation and there-nothing hidden about the thing. You just walked in there and asked him for some liquor and he sold it to you and it was more or less generally known it was carried on that way."

A raid was scheduled for Saturday afternoon, May 6, 1967. However, on Friday evening it was discovered that Park was attempting to move large quantities of alcohol from these two places. Thereupon, the scheduled raid was immediately made and $21,700 of contraband, consisting of 31 cases of whiskey and 2,254 cases of beer, was taken. Park and Albert Funderburk, who had been employed at "the yellow house" by Park for almost two years, were arrested. Criminal cases were made against the two men by Hoard.

On May 23, 1967, upon Hoard's petition, an order was issued directing that the two places be padlocked.

On July 11, 1967, Park, Funderburk and another employee of Park entered pleas of guilty for such illegal

alcohol operations, and their fines, totalling $6,300, were paid by Park. Also, on this date, an appeal from the padlock order was dismissed. About this time Funderburk made plans to move back into the yellow house in August.

Neither this padlock order nor the confiscation order on the alcohol seized was carried out until after the death of Hoard. There is no evidence as to why these orders were not executed.

An Atlanta police officer testified that on the morning of August 7, 1967, he was en route to the courthouse of Jackson County to go before the grand jury with reference to auto larceny there.

Next, we recite the salient testimony of events immediately surrounding the murder.

This testimony was given by the co-indictee Blackwell, to whom the State had offered to recommend a life sentence provided he would testify fully, fairly and completely, and also by the co-indictee Seay. No mention of any such offer to Seay appears.

Blackwell's testimony, insofar as material on these issues, was that which follows.

Prior to Solicitor General Hoard's death Seay asked Blackwell if he had the nerve to kill anybody and two weeks later inquired of him if he would "blow that man up," without identifying anyone. No affirmative answer appears to have been given.

On Thursday before Hoard's death on Monday, August 7, 1967, Seay, Blackwell, and other co-indictee, Worley, met by pre-arrangement at a named highway restaurant in another county and drove to Anderson, South

Carolina, where Blackwell, with money provided by the others of that group, purchased sticks of dynamite and caps. On Saturday Seay showed Blackwell how to place these to the coil of an automobile.

On Sunday evening Blackwell, Seay and Worley met. Seay offered Blackwell $1,500 if he would go with them and watch while Seay or Worley put the dynamite on the car. One of them, Seay he thought, told Blackwell "the man wanted it done that night before he went to court on Monday." Worley pointed out Hoard's house, and Seay made a short trip to verify it and the car parked there as Hoard's. During this time Blackwell and Worley went to a nearby place, wired several sticks of dynamite together, and returned to a point near Hoard's residence.

Then Blackwell went to Hoard's yard where his car was parked, placed the dynamite and one cap to the coil of the car, and rejoined Seay and Worley. The three drove away, and at a bridge the shoes and Gloves Blackwell had worn were thrown out.

Later on the same night Blackwell went to Wrightsville, Georgia, and during the morning heard of Hoard's death over the radio.

On the following Wednesday, Seay gave Blackwell $700 in cash and an automobile valued at $800.

Blackwell identified certain photographs, including places and objects associated with the murder.

The testimony of the co-indictee Seay, insofar as material here, was that which follows.

He had known Blackwell about eight months, Worley four or five years, and Pinion some six to eight years.

He was 23 years of age and had known Park since childhood.

He had not had any direct dealings with Park.

In June, about two months before Hoard's death, Pinion asked Seay if he wanted to make some "easy money," and later told him that "he wanted a man done away with," saying it was Hoard. He did not say who wanted it done, but mentioned to him "the old man" several times.

Pinion had told Seay on a number of occasions that he was working with Park, and Seay once talked with both of them about their buying liquor from him. They talked about payment and arrangements in connection with this, and one of them told him that whenever he needed money he could come to Park's place and pick it up, but Seay did not recall ever doing so.

This dealing with Park and Pinion began three or four years previously and continued until Hoard was killed. Pinion was the only person he dealt with on behalf of Park. When he had the conversation with Pinion about doing away with Hoard, he knew that Pinion was acting on behalf of Park, and in their conversations Pinion and he always referred to Park as "the old man."

Pinion did not tell Seay that "the old man" wanted Hoard done away with, but that "a man wanted somebody done away with." Also, he did not say why he wanted Hoard killed. He mentioned to Seay the liquor raid made by Hoard, but Seay did not recall whether this was at the same time he discussed killing Hoard.

Pinion first offered Seay $5,000, and said it would be

best to kill Hoard on the road with a shotgun as he was returning home.

Seay told Pinion that he was not interested but would try to find someone. Seay mentioned it to Worley, who wanted $7,500. Worley did not know who Seay had in mind to be killed. Pinion said that Hoard had to be killed before he went to court that Monday morning, and Seay so told Worley. Seay then reported to Pinion that he had someone to do it if he would pay more money. Pinion replied, "Well, that is all the man will pay," and "I don't think the man will pay any more. I will go see. I will check." Pinion left and in about 45 minutes he returned and told Seay, "the old man won't go up any more. I will put $500 on it. Make it $5,500." Worley did not wish to do it but decided to go ahead.

On either Thursday or Friday, Seay, Blackwell, and Worley arranged their meeting at a highway restaurant, made the trip to South Carolina, purchased the explosives, returned to Jackson County, and Blackwell experimented with wiring the caps to a 1964 Ford automobile.

Seay told Worley that he did not want to be involved, but Worley replied that if he didn't, "the old man" would get someone else and intimated that "the old man" would harm him or his family. Seay knew whom Worley was referring to, and stated that "we always referred to 'the old man' as Mr. Park."

Seay then testified essentially the same as Blackwell with reference to what transpired later, including the meeting on Sunday night of him, Blackwell and Worley, their proceeding to and locating Hoard's residence and

car, tying the explosives, Blackwell's rigging them to the automobile, disposing of the shoes and gloves, going to Wrightsville, learning of Hoard's death, and returning to Pickens County. Seay also identified the same photographs that Blackwell had verified.

Five or six days after Hoard's death Pinion brought $5,500 in cash to Seay, and Seay gave the money to Worley who divided it $2,000 to Seay, $2,000 to Worley and $1,500 to Blackwell. Pinion told Seay that "the old man" was worried and had asked who did it, and that he had told him others did it.

There was testimony by other witnesses for the State, which verified some of the foregoing, particularly the physical facts, but it is not necessary to recite it here.

In his unsworn statement Park disavowed any participation whatever in the murder of Hoard.

Motions were made to exclude many items of testimony, but they were denied.

The defendant moved for a directed verdict of not guilty. This motion urged that the evidence failed to show that the defendant Park was a party to a conspiracy to murder Hoard and also that the testimony of Seay, an alleged accomplice, was not corroborated. This motion was denied.

Pursuant to a ruling by the court, the State was permitted to make the opening and concluding argument to the jury.

1. We first consider the rulings as to the admission of certain evidence.

(a) Six of the enumerations complain of separate

conversations between agents of the Georgia Bureau of Investigation and Hoard, another agent, the sheriff and a state trooper. The seventh relates to a conversation between the sheriff and another person. These were claimed to be inadmissible because they were hearsay. From the study we have made of such enumerations we conclude that these conversations were properly admitted in evidence to explain the conduct and ascertain the motives of parties on the major issue of conspiracy. Code § 38-302; *Bryant v. State,* 191 Ga. 686 (14) (13 SE2d 820); *Jones v. State,* 224 Ga. 283, 285 (SE2d).

(b) Another enumeration relates to testimony that when a named person sold the witness liquor several times it was really on behalf of Park. It is contended that this was a conclusion, without probative value. This contention is not meritorious. This statement was based on facts already in evidence.

(c) One enumeration urges that it was erroneous to permit the witness Seay to testify that he knew whom Worley meant when he referred to "the old man." This was not a mere conclusion, as contended, because Seay also testified that he and Worley always referred to Park as "the old man."

(d) The final enumeration in this category argues that the trial court erred in permitting Seay to testify to a conversation when both Pinion and Park were present, without requiring proof as to whether it was Pinion or Park who made such statements. This is not valid. The witness testified that he could not remember which one said it, thus leaving the matter for the jury's determination.

2. (a) Since this defendant did not commit the act

itself and was not actually present at the scene when others committed it, in order for him to be convicted the evidence must connect him with the crime upon the theory of conspiracy, which is "a corrupt agreement between two or more persons to do an unlawful act." *Fincher v. State,* 211 Ga. 89 (4) (84 SE2d 76).

Proof of conspiracy is required for the admission of the testimony of Seay as to declarations allegedly made to him by Pinion and as to statements allegedly made to him by Worley.

Our Code, § 38-306, provides that "After the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all." This court, in applying this section, has held that the conspiracy itself must be proved by evidence aliunde such declarations, and that the declarations are not admissible unless the conspiracy is prima facie shown by such aliunde evidence. *Lanier v. State,* 187 Ga. 534 (4), 542-543 (1 SE2d 405), and citations.

The existence of a conspiracy "may be established by direct proof, or by inference, as a deduction from acts and conduct, which declares the common design on their part to act together for the accomplishment of the unlawful purpose. In other words, the existence of the common design or purpose between two or more persons to commit an unlawful act may be shown by either direct or circumstantial evidence." *Chappell v. State,* 209 Ga. 701, 702 (75 SE2d 417).

Under the evidence here there was admittedly and unquestionably a conspiracy among several persons to violate the laws of this State with reference to the sale of

alcoholic beverages. It is equally certain that the defendant Park and Pinion were members of that conspiracy, and it is probable that others, including Seay, belonged to it.

The State contends that Hoard's death was pursuant to or in furtherance of that conspiracy. It relies upon the rule that "It is not necessary that the crime of murder should be a part of the original design; but it is enough if it be one of the incidental probable consequences of the execution of their design . . . " (*Gore v. State,* 162 Ga. 267 (1) (a) (134 SE 36)), or if it "naturally or necessarily is done pursuant to or in furtherance of the conspiracy." *Handley v. State,* 115 Ga. 584 (41 SE 992) (one Justice absent).

The State urges that the evidence as a whole, and with all inferences and deductions therefrom, leads to the conclusion that the death of Hoard was deemed necessary to protect Park's illegal liquor operations and was in furtherance of the conspiracy to violate the liquor laws. It argues *that Hoard's death was considered necessary because he planned to present to the grand jury on the day of his death facts as to Park's activities.*

For support of this contention the State relies upon much of the foregoing evidence, including the following: that Hoard had instituted the padlock proceedings against Park; that he had caused the confiscation of Park's contraband alcohol; that he had filed criminal accusations against Park and others; that they had plead guilty and their fines totaling $6,300 had been paid by Park; that Park's liquor locations had not been in fact padlocked; that the contraband had not been destroyed; and that Funderburk intended to move back in "the yellow house" in August.

As we view the record, a conspiracy involving the defendant in the murder of Hoard was prima facie shown by such aliunde evidence, and the inferences and deductions therefrom.

(b) In view of such evidence as to conspiracy it follows that it was not error to permit Seay to testify as to the declarations made to him by Pinion that "the old man won't go up any more" and that "the old man was worried;" or as to Worley's statement to him that "the old man" would harm him or his family if he did not participate.

Accordingly, it was not error for Seay to testify that Pinion told him that he was working with Park in the liquor business. Nor was it error for him to testify that he knew when he was dealing with Pinion in June that he was dealing with him as agent of Park, since the basis for that statement was what Pinion had told him about Park's involvement in the conspiracy to kill Hoard.

Also, it was not error to permit a law enforcement officer to testify as to what Pinion told him during the interval between the commission of the crime and its solution as to his whereabouts the night that Hoard was killed.

Therefore, none of the items of testimony referred to above were hearsay, as contended. Nor were they mere conclusions.

3. (a) Since there was evidence of Park's participation in a conspiracy to murder Hoard, the grounds of Park's motion for directed verdict which urged that there was no such evidence was not meritorious.

(b) Nor was there merit in the ground of that mo-

tion which asserted that he was entitled to a directed verdict of not guilty because the testimony of Seay, an alleged accomplice, was not corroborated by other evidence connecting the appellant with the murder.

Our Code, § 38-121, requires that in a felony case the testimony of an accomplice must be corroborated.

As to this requirement, this court in *Lanier v. State*, 187 Ga. 534, 539, supra, stated: "This court has construed that portion of this Code section relating to the necessity of connecting an accomplice in felony cases many times, and no doubt can now be fairly entertained as to its meaning as construed. In every case the corroborating circumstances must connect the defendant with the crime independently of the testimony of the accomplice, and this requirement is not met by merely corroborating the accomplice as to time, place, and circumstances of the transaction, if there be nothing to connect the defendant therewith." See also, *Childers v. State*, 52 Ga. 106; *Myers v. State*, 151 Ga. 826 (108 SE 309); *Price v. State*, 208 Ga. 695 (3a) (69 SE2d 253).

However, "It is not required that this corroboration shall of itself be sufficient to warrant a verdict, or that the testimony of the accomplice be corroborated in every material particular. [Citations.] Slight evidence from an extraneous source identifying the accused as a participator in the criminal act will be sufficient corroboration of the accomplice to support a verdict. [Citations.] The sufficiency of the corroboration of the testimony of the accomplice to produce conviction of the defendant's guilt is peculiarly a matter for the jury to determine. If the verdict is founded on slight evidence of corroboration connecting the defendant with the crime, it cannot be said, as a matter of law, that the verdict is contrary

to the evidence." *Hargrove v. State,* 125 Ga. 270, 274-275 (54 SE 164).

Ordinarily testimony of one accomplice if satisfactory to the jury is sufficient corroboration of another accomplice in a felony case. *Pope v. State,* 171 Ga. 655 (156 SE 599) (one Justice absent); *McCormick v. State,* 176 Ga. 21 (4) (166 SE 762); 7 West's Ga. Dig. 472, Criminal Law, § 511 (10).

However, even if the testimony of Seay, an accomplice, is deemed to be corroborated by Blackwell only insofar as to "time, place, and circumstances," without showing "any criminal connection" with the defendant Park (*Myers v. State,* 151 Ga. 826, supra), ample evidence exists of corroboration connecting Park with the crime by reason of his conduct, as detailed in division 2 (a). *Williams v. State,* 222 Ga. 208, 220 (149 SE2d 449) (one Justice dissenting). See also, *Thornton v. State,* 119 Ga. 437, 439 (46 SE 640).

The evidence relied upon by the State as corroborating the testimony of the accomplice Seay tended to connect Park with the murder and was sufficient to support his conviction.

For the foregoing reasons, the motion for directed verdict of not guilty was properly overruled.

4. The last enumeration of error complains of the trial court's ruling denying the defendant Park the right to the opening and concluding argument to the jury. This ruling was based on the fact that the defendant, while making his unsworn statement, referred to and displayed certain documents.

The record is not clear as to exactly what occurred in

this regard. The defendant's statement shows only the following: "I gave Mr. Hoard the power of attorney in 1957. And this here is just a copy of some insurance to show that I lent Mr. Hoard the money [previously referred to in the statement]. It's got Mr. and Mrs. Floyd Hoard on it. Lad and Lassie Shop, $1,000." No objection by the State is shown. The State's motion for the opening and concluding argument stated "Park exhibited to the jury a power of attorney . . . He showed it and displayed it to the jury. The second thing is that he showed an insurance policy in support of his contention that he had loaned Fuzzy Hoard money . . ."

We find this enumeration meritorious.

Our Code, § 27-2201, provides: "After the testimony shall have been closed on both sides, the State's counsel shall open and conclude the argument to the jury, except that, *if the defendant shall introduce no testimony,* his counsel shall open and conclude after the testimony on the part of the State is closed." The word "testimony" includes documentary evidence. *Hargrove v. State,* 117 Ga. 706, 708 (45 SE 58).

So far as we are able to ascertain, this court has never passed upon the precise question now presented, i.e., whether the defendant loses the right to the opening and concluding argument by exhibiting documentary evidence, although not formally introducing such into evidence.

However, in *Freeney v. State,* 129 Ga. 759 (2) (59 SE 788), where the defendant had been denied the opening and concluding argument, this court stated that the exact question before it was whether some rent receipts "were simply read or spoken of in the defendant's statement,

or were introduced in evidence," thus recognizing a distinction between the effect of a defendant's exhibiting a document and of his introducing it in evidence.

In the *Freeney* case the defendant in making his statement had referred to rent receipts and exhibited them to the jury by handing them to the jury and letting them examine them and hand them back. The solicitor general then requested the stenographer to mark them for identification which was done; later, execution of a receipt was proved by a State's witness on cross-examination; and then defendant's counsel said "We offer that with the others; they are already in evidence," to which the solicitor general replied "All right." The court found that the receipts were introduced in evidence and therefore that the denial of the opening and concluding argument to the defendant was correct. Justice Lumpkin, writing the opinion for the court, stated "If it were clear that the rent receipts which formed the subject of the ruling in regard to the opening and conclusion of the argument were merely read by the defendant as a part of her statement, without objection from counsel or ruling thereon by the court, and were not introduced in evidence, the writer would be strongly of the opinion that this would not have affected the right of her counsel to open and conclude the argument."

Later, the identical question now before this court was ruled upon by the Court of Appeals. *Hart v. State,* 88 Ga. App. 334 (76 SE2d 561). It expressly adopted Justice Lumpkin's view above quoted, and reversed the denial to the defendants of the opening and concluding argument where they "had introduced no evidence but had merely made their statements during the making of which one of the defendants exhibited to the jury

certain clothing, but this was never introduced in evidence." The court pointed out that ". . . . it has been held that it is not error to refuse to allow the defendant to read to the jury from papers and documents not introduced in evidence . . . yet it has never been held in this State . . . that, where a defendant in making his statement reads inadmissible documents or exhibits inadmissible objects to the jury, this action in and of itself constitutes the documents or objects to be evidence even though they are never introduced." It held: "While the trial court in the present case would not have erred under the authorities referred to above, in refusing the defendant the right to use the clothing to illustrate that the deceased was attacking the defendant with a screw driver, having failed to do so at the request of the solicitor general, we think that the court could not cure that error by depriving the defendants of their right to the opening and concluding argument where they introduced no evidence and the case must be remanded for a new trial."

Subsequently, the Court of Appeals dealt with this same subject, but with different facts, in *Carter v. State*, 107 Ga. App. 571 (3) (130 SE2d 806). There, the defendant was charged with giving a worthless check. While making his unsworn statement he wrote his name on a paper and showed it to the jury for the purpose of comparing it with the signature on the check. The record of the case recites that this paper was "shown to jury and accepted," and that immediately thereafter the solicitor said, "Your Honor, have him print it, this signature is printed." The record does not indicate whether this was done.

The *Carter* case opinion quoted from *Hall v. State*,

104 Ga. App. 10, 11 (120 SE2d 925), the rule that the statement "must generally be restricted to a narrative account of the matter under investigation and if he desires to corroborate the statement by documents or real evidence, said evidence must be introduced in the usual and regular way." The *Carter* opinion then stated: "Under the record here it is manifestly clear that the court considered the sheet of paper that the defendant wrote his name on as being evidence," citing *Savannah Electric Company v. Lowe*, 27 Ga. App. 350 (5a) (108 SE 313). In the latter case it held that where municipal ordinances were "not formally tendered in evidence," but were pleaded and read to the court in the presence of the jury without objection, such treatment of them will be taken "as equivalent to a formal tender." After citing the *Savannah Electric Company* case, the *Carter* opinion stated: "Applying the facts in the case to the law enunciated in the case just cited, the trial court's ruling denying defendant's counsel the opening and concluding was not error." Therefore, this was a holding that the defendant introduced evidence, and for that reason lost his right to the opening and concluding argument in view of Code § 27-2201.

Here, the record contains no indication whatsoever that the documents mentioned by the defendant in his statement were introduced in evidence. The State does not even contend any more than that these papers were *exhibited* to the jury. So far as is shown they never left the defendant's hands.

Having introduced no evidence, the defendant was entitled to the opening and concluding argument.

The conclusion which we have reached accords with that set forth in 23 CJS 982, Criminal Law, § 983: "In

some jurisdictions counsel for accused may open and close the argument, in cases where accused introduces no evidence. Where an accused is permitted to make a statement not under oath which is not, in a technical sense, evidence, as shown infra § 1026, the making of such statement does not deprive him of the right even though he is permitted, in making the statement, to exhibit to the jury objects which are inadmissible or to read to the jury from inadmissible documents." Cited are *Freeney v. State,* 129 Ga. 759, supra, and *Hart v. State,* 88 Ga. App. 334, supra.

This right to open and conclude when the defendant introduces no evidence has been the law of this State since January 22, 1852 (Ga. L. 1851-52, p. 242; Code § 27-2201). It is a substantial procedural right and has many advantages. It is available to all.

This defendant was entitled to a trial in accordance with law, which included the exercise of this right.

Speculation as to whether its denial was prejudicial to him has no place here. In this instance the death penalty was imposed. It cannot be said that the error was harmless.

For the reasons set forth in division 4 of this opinion the judgment is reversed with direction that the defendant be granted a new trial.

Judgment reversed with direction. All the Justices concur, except Duckworth, CJ., Nichols and Undercofler, JJ., who dissent.

Hoard v. State, Nichols, Justice dissenting. I dissent from the holding in division 4 of the majority opinion as well as the judgment of reversal.

While the majority opinion cites cases which correctly hold that upon objection by the solicitor-general the defendant may be precluded from exhibiting physical evidence to the jury in corroboration of his unsworn statement, yet the law does not place the burden upon the solicitor-general to warn, by objection, the defendant that he is in danger of losing, by such conduct, the right of having the opening and concluding argument where he has not introduced any other evidence during the trial of the case.

The transcript of the evidence in the present case discloses that the defendant used the language "this here" in his unsworn statement to the jury which shows without dispute that the defendant was exhibiting documents to the jury to corroborate his unsworn statement. Such conduct was tantamount to introducing such documents into evidence and accordingly the trial court did not err in so holding and in giving to the State the right to open and conclude the argument to the jury.

I am authorized to say that Duckworth, C. J., and Undercofler, J., concur in this dissent.

SUPREME COURT OF GEORGIA

Atlanta, July 2, 1968

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

A. C. (CLIFF) PARK v. THE STATE.

This case came before this court upon an appeal from the Superior Court of Jackson County; and, after argument had, it is considered and adjudged that the judgment of the court below be reversed with direction for the reasons stated in the opinion this day filed. All the Justices concur except Duckworth, C. J., Nichols and Undercofler, JJ., who dissent.

Bill of Costs, $30.00

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NUMBER 557

A. C. PARK,
Petitioner

vs.

THE STATE OF GEORGIA,
Respondent

ADDITIONAL APPENDIX TO PETITION FOR CERTIORARI

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Atlanta, Georgia 30303

IN THE

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THE STATE OF GEORGIA,

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ADDITIONAL APPENDIX TO PETITION FOR CERTIORARI

This Appendix of Record is being separately presented under and by virtue of the authority provided for by Rule 23 (f) of the Rules of the Supreme Court of the United States.

The portions of the Record relied upon as will show the manner of raising the federal questions both in the court of first instance and in the appellate court, are

herein included in this separately presented Appendix to petition for certiorari.

GROUND #3 OF MOTION FOR REHEARING (R. 784)

3.

This Court Has Placed An Unconstitutional Interpretation On Admissibility Of Hearsay Declaration Of Conspirator, By Not Permitting Defendant To Be Confronted With Witness Against Him.

The court, on p. 13 and 14, division 2 (b) of its opinion, held:

> "In view of such evidence as to conspiracy it follows that it was not error to permit Seay to testify as to the declarations made to him by Pinion that 'the old man won't go up anymore' and that 'the old man was worried'; or as to Worley's statement to him that 'the old man' would harm him or his his family if he did not participate."

The court, in so holding and deciding, overlooked the decision of the Supreme Court of the United States in the case of *Bruton v. U.S.*, No. 705, 36 L.W. 44-47, Oct. Term 1967, Decided May 20, 1968, holding as follows:

> "We hold that, because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evans' confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment."

The *Bruton* case, *supra,* was decided by the Supreme Court of the United States about a week after the oral

argument before this Court in this case, and concerned the admissibility of an extrajudicial confession of a co-defendant implicating the defendant on trial. The objection to hearsay and prejudicial admission into evidence was held by the Supreme Court to be of a more serious nature in that such hearsay declaration deprived the defendant of the right to be confronted with the witness against him and also deprived him of the constitutional right to cross-examine the truthfulness and veracity of such declaration. The Court went on to say:

> "Here Evans' oral confessions were in fact testified to, and were therefore actually in evidence. That testimony was legitimate evidence against Evans and to that extent was properly before the jury during their deliberations. Even greater, then, was the likelihood that the jury would believe Evans made the statements and that they were true – not just the self-incriminating portions but those implicating petitioner as well. Plainly, the introduction of Evans' confession added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination, since Evans did not take the stand. Petitioner thus was denied his constitutional right of confrontation."

In footnote number three to the same opinion, the Supreme Court stated:

> "We emphasize that the hearsay statement inculpating petitioner was clearly inadmissible against him under traditional rules of evidence."

This Court, in holding and deciding that hearsay declarations by Pinion and Worley were admissible against Park, has overlooked the following provision of the Constitution of the United States:

> "In all criminal prosecutions, the accused shall

> enjoy the right * * * to be confronted with the witnesses against him." (Amendment 6, United States Constitution.)

This holding of the Court also overlooks the fact that the appellant, by having such hearsay declarations admitted against him as evidence, has been denied the right to cross-examine the declarants, Pinion and Worley, as to whether or not such declarations were *true* or *false,* or *mere opinions* of such declarants, and thus the holding of this Court in division 3 (a) of the opinion that there was evidence of Park's participation in a conspiracy to murder Hoard, denied to the appellant due process of law as provided by the Fourteenth Amendment to the United States Constitution.

This Court has in effect allowed such declarations to be considered as testimony of Pinion and Worley just as much as if they had testified to such facts from the witness stand. Thus the hearsay declarations are in evidence without having even afforded the defendant the right to be confronted by such witnesses or to cross-examine them as to its truthfulness or veracity.

Because of these facts the declarations of Pinion and Worley were hearsay and inadmissible and this Court erred in holding them to be admissible.

(R. 734, 738)

A. C. (CLIFF) PARK vs. THE STATE	CASE NUMBER 24588 SUPREME COURT OF GEORGIA

ENUMERATION OF ERRORS

1. The trial court erred in failing and refusing to direct a verdict of not guilty and in overruling appellant's motion for directed verdict on the ground the evidence failed to prove a prima facie case of conspiracy to murder against the appellant and failed to prove the appellant to have been a party to a conspiracy to murder Floyd Hoard. (T. 585-590)

2. The trial court erred in failing and refusing to direct a verdict of not guilty and in overruling appellant's motion for directed verdict on the ground that the testimony of Lloyd Seay, a witness for the State and alleged accomplice, was not corroborated by other evidence connecting the appellant with the offense of murder and the case should not have been submitted to the jury. (T. 585-590)

3. The trial court erred in permitting State witness Lloyd Seay, over objection by the appellant, to testify to the contents of a conversation with Douglas Pinion made out of the presence of the appellant that the witness told Pinion that the man who wanted to do the killing wanted $7,500.00 instead of $5,000.00 and Pinion replied that he would go see but he didn't think that the man would pay more than about 45, so the witness stayed an hour and Pinion came back and said "the old

man" wouldn't go up any, but "I will put $500.00 on it and make it $5,500.00." (T. 577-578) This testimony was inadmissible because it was a hearsay declaration of an alleged conspirator made out of the presence of the defendant on trial without the State having proved a prima facie case of conspiracy against the appellant to murder the person alleged in the indictment to have been murdered. (T. 496 & 577 & 578 - 463 to 481 - 483 to 487)

4. The trial court erred in permitting State witness Lloyd Seay to testify, over objection by appellant, to the contents of a conversation with George Worley made out of the presence of the appellant. The testimony objected to and admitted was as follows:

> "Yes sir. As I stated, I can't remember the exact words, but he told me if I didn't go along with them that the old man would just get somebody else to do it, and I would be the only one that knew about it — that they knew about it — and after that he was killed by somebody else, if he were picked up he would be afraid I would talk or implicate him some way, and he would have something done to me or parts of my family, and that that could happen." (T. 579-580-497)

5. The trial court erred in permitting State witness Lloyd Seay to testify, over objection by appellant, to the contents of a conversation with Douglas Pinion, made out of the presence of the appellant. The testimony objected to and admitted was as follows:

> "Yes sir. He did. He said the old man was worried. That he kept asking him who done it, and Doug said he never did tell him. Said he told him one time somebody from Mississippi might have done it, and next time he told him a man from Detroit." (T. 511, 580, 581, 582 and 583)

6. The trial court erred in permitting State witness Ronald Angel to testify, over objection by appellant, to the contents of a conversation with Douglas Pinion on September 5, 1967, out of the presence of the appellant at which time the following testimony was given by the witness and admitted by the court:

> "I asked Mr. Pinion in response to this investigation if he would give me a statement as to his whereabouts the night of August 6th, the Sunday night. Mr. Pinion advised me that he was at his mother's residence; that he was there with his girl friend, Eugenia Smith. up until approximately 10:00 to 10:30 at night. He said that upon his girl friend leaving, he left the residence and went to Barrow County, Winder, Georgia and did not return home until approximately 1:30 A.M. in the morning." (T. 552, 553, 583, 584, 585)

7. The trial court erred in permitting State witness Cleghorn to testify, over objection by appellant, to the contents of a conversation with Mr. Angel relating to Angel's being out at "Mr. Cliff's where they have a big truck backed up where they can load it," made out of the presence of the appellant. (T. 573, 574)

8. The trial court erred, in permitting State witness Cleghorn, over objection by appellant, to testify to the contents of a conversation between the witness, the Sheriff and the Solicitor out of the presence of A. C. Park, relative to waiting until the next morning to make the raid on the appellant's house. (P. 574-575)

9. The trial court erred in permitting State witness Cleghorn, over objection by appellant, to testify to the contents of a conversation with Trooper Rawlings going to the yellow house. (P. 575-576)

10. The trial court erred in permitting State witness Vernon Kidd, over objection of appellant, to testify to the contents of a conversation had with Sheriff Perry in the early part of 1966 about the sale of beer. (T. 576, 577)

11. The trial court erred in permitting State witness Lloyd Seay to testify, over objection by appellant, that Douglas Pinion told him that he was working with Mr. Parks. (T. 462 to 481)

12. The trial court erred in permitting State witness Ronald Angel, over objection by appellant, to testify that if Funderburk had sold him liquor eight times it was really on behalf of Mr. Park. (T. 576)

13. The trial court erred in permitting State witness Lloyd Seay to testify, over objection by appellant, that he knew when he was dealing with Doug Pinion in June that he was dealing with him as the agent of Mr. Park. (T. 485, 486)

14. The trial court erred in permitting State witness Lloyd Seay to testify, over objection by appellant, that he knew who George Worley was talking about when he was talking about "the old man." (T. 499, 500)

15. The trial court erred in permitting State witness Lloyd Seay to testify, over objection by appellant, that George Worley told him that "the old man" would have something done to him or parts of his family in order to scare the witness into going along with him. (T. 500, 501)

16. The trial court erred in permitting State witness Lloyd Seay to testify, over objection by appellant, to the contents of a conversation had between the witness and

Pinion in the presence of A. C. Park, without requiring proof as to whether Pinion or Park made such statements. (T. 482, 483)

17. The trial court erred in permitting State witness Cleghorn to testify, over objection by appellant, to the contents of a conversation with the deceased, Floyd Hoard, during the last part of March or first part of April, 1967, relating to the deceased's distrust of the Sheriff and the Revenue Agents, (T. 568) and other hearsay events, (T. 569, 570,) all out of the presence of the appellant.

18. The trial court erred in permitting State witness Cleghorn, over objection by appellant, to testify to the contents of a conversation with Floyd Hoard, deceased, on the Thursday prior to the raid. (P. 570-571)

19. The trial court erred in permitting State witness Cleghorn, over objection by appellant, to testify to the contents of a conversation with Floyd Hoard, deceased, that a Sheriff and Solicitor ought to get along and that the fine you get off a man like that is not a drop in the bucket. The merchandise you take away from him is where you tear him up. That means everything to me. (P. 571-572-573)

/s/ WESLEY R. ASINOF

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MOTIONS TO EXCLUDE HEARSAY EVIDENCE (R. 660, 676)

MR. ASINOF. I might say that the motion we have will be a motion to exclude certain portions of the testimony. I want to apologize at this time to the Court, that while it may seem a little cumbersome, but I think it is necessary to point them out in defense of my client in order to comply with the rulings of the appellate court.

THE COURT. All right, sir.

MR. ASINOF. I move the Court to exclude a certain portion of the testimony of Lt. Cleghorn, a witness for the State, as appears in his testimony, and the specific testimony that I move to exclude is Lt. Cleghorn's testimony that the Solicitor talked to him in Winder about the last of March or the first of April about the Pendergrass deal, and he said something had to be done, and that he didn't trust the Sheriff; he didn't trust the Revenue Agents, and asked the witness if he would help him and stay with him, and the witness replied that he would; and the further testimony by the witness that the Solicitor had told him that the only man that could make him not do it would be the witness' voice. The witness didn't believe he could, and the Solicitor further stated that he would contact the witness later.

MR. ASINOF. His further testimony along that line that just a few days prior to that the Solicitor called him at his home one night, and asked him if he would go, and if Slick Culverson lived at Gainesville, and the witness told the Solicitor he did. The Solicitor further asked him if he would go to Slick Culverson's with him.

MR. ASINOF. (continuing) The further testimony

of the same witness immediately following that that he told the Solicitor that he would, and the Solicitor asked if he would, and that the witness testified that the Solicitor then said — "Will you carry me?" To which the witness replied, "Yes, sir." When the Solicitor again was quoted as saying, "What time?" The witness said, "You name it." Further testimony by the witness immediately thereafter that the Solicitor said, "8 o'clock," and the witness replied, "Yes, sir; I will be leaving at 8:00 o'clock."

MR. ASINOF. (continuing) The further testimony by the witness of the conversations, he called Fred to be sure Fred would be at home, and that he then asked Fred for an undercover man from the Revenue Department, and that Fred told him that he would get him one just as soon as he could; that he had his best man to cover one in Americus — to cover a man in Americus and that his wife was expecting a baby. That he didn't know if she had the baby or not, but he would get him someone as quick as he could. The witness further testified that Fred asked him if he would help him on the Pendergrass deal, and that Mr. Hoard said that he wanted to get enough on Pendergrass to padlock him.

MR. ASINOF. (continuing) The further testimony of the witness that he told the Solicitor that he would help him.

MR. ASINOF. (continuing) Now we move to exclude all of that evidence on the ground that the witness was testifying to a hearsay conversation between himself and the deceased, Floyd Hoard, some several months before Mr. Hoard's death, the conversation being hearsay, not subject to cross examination by the person mak-

ing it, a denial of the defendant's Constitutional right to be confronted with the witnesses against him, to-wit: Mr. Floyd Hoard, and not illustrating any issue in this case, and having been failed to have been connected up by the defendant as being relevant or material to the issues in this case, and also being highly prejudicial, and our motion is to exclude that evidence at this time and instruct the jury to disregard it.

MR. HAMES. Once the State has prima facie proved the existence of a conspiracy, the acts, conduct of the conspirators and the entire force of the conspiracy itself, it is proper to trace it back to its beginning.

MR. HAMES. (continuing) We submit that in tracing it back that a conspiracy that the State has established the acts and conduct that brought about the investigation and subsequent arrest which eventually provided the motive for the defendant to kill Floyd Hoard is admissible for that purpose.

THE COURT. All right, sir. The Court will so rule and overrule the motion to exclude.

MR. ASINOF. All right, sir. We now move the Court to exclude a certain portion of the testimony of Lt. Cleghorn, a witness for the State, wherein he testified as to a conversation held with the Solicitor on Thursday prior to the raid, to the effect that the witness testified that the Solicitor had asked him where Angel was, and the witness replied that "he was out somewhere," and the Solicitor then said, "Would you call him in?" And the witness then a few minutes later testified that he had a further conversation then and there with the Solicitor, Mr. Floyd Hoard, in which Mr. Hoard said to him, "Let's ride up the road," and he further stated to the witness, "Let's go in my pickup."

MR. ASINOF. (continuing) We are moving to exclude that portion of Lt. Cleghorn's testimony on the ground that it consisted of a hearsay conversation with Mr. Floyd Hoard sometime prior to his death. There is not evidence that the defendant was present. It is not admissible as in any way as a statement of declaration, confession or admission by the defendant, or by any person charged in this case as a conspirator by the State or a defendant in this case — the defendant in the crime for which the indictment is drawn and on the ground that this testimony now appearing to have been made out of the presence of the defendant is highly prejudicial, inflammatory, irrelevant, immaterial, and highly prejudicial to him and we move to exclude it.

THE COURT. All right; Mr. Hames?

MR. HAMES. The testimony which might under some circumstances might be hearsay changes its character and becomes original evidence in order to explain acts, conduct, and motive.

THE COURT. All right, sir. Motion to exclude is overruled.

MR. ASINOF. Now, if Your Honor please, we move to exclude a portion of the testimony of Lt. Cleghorn, a witness for the State, in which he testified to a conversation with the Solicitor, Mr. Floyd Hoard, in which he testified Mr. Hoard told him out of the presence of this defendant and any defendant named in this bill of indictment prior to Mr. Hoard's death that a Sheriff and a Solicitor ought to get along, and that Mr. Hoard thought that he ought to tell the Sheriff, to which the witness replied, "Solicitor, you are the one that's handling the raid. You are the Solicitor; if you want to tell

the Sheriff, you tell him." And when the witness told the Solicitor, "The fine you get off a man like that is not a drop in the bucket. The merchandise you take away from him is where you tear him up."

MR. ASINOF. (continuing) And the further testimony by the witness that the Solicitor stated to him, "That means everything to me. You all don't know what that does mean to me." And the witness replied, "Yes, sir. I know what it means to you."

MR. ASINOF. (continuing) Wherein the witness testified that the Solicitor stated to him, "You have told the Sheriff; you told him you wouldn't buy anything — wouldn't sell him nothing. That is exactly right." And at the same time the conversation in which the witness testified of a conversation had — that would suffice on that motion, Your Honor, except to state that we are moving to exclude it on the grounds that it is hearsay, and not made by any of the persons charged as being a conspirator, and made out of the presence of the defendant in the case and any of the other defendants, and therefore is irrelevant, immaterial, and highly prejudicial.

MR. HAMES. Your Honor, we are not now in the act of receiving evidence, but I am informed that some jurors have come into the courtroom.

THE COURT. Ladies and gentlemen, is there anyone in this courtroom that received a summons to appear today? If you are, stand up and hold up your hand. Last week, too. Only one? I'll ask you to leave the courtroom, and there's another one. All those who have received summons for this week or last to be here, please leave the courtroom and don't come back until 9:00 o'clock in the morning. And I'll instruct the Bailiff's to try to

inquire of those who try to come in as to whether or not they have received a summons for jury duty, and, if so, deny them admittance, please. Thank you.

MR. HAMES. To the objection that has been made in this instance, I will restate that the conversations and other matters that normally would be considered as hearsay become not hearsay, but original evidence and are admissible to explain acts and conduct and motive.

THE COURT. All right, sir. The Court will overrule the motion to exclude that testimony.

MR. ASINOF. All right, sir. Now, we move the Court to exclude from evidence the testimony of Lt. Cleghorn to the effect that he had a telephone conversation on Friday — a Friday night about 10:00 o'clock, with a Mr. Angel, to the effect that Mr. Angel stated to the witness that he had been out to Mr. Cliff's, and "they have got a big truck backed up there where they can load it," to which the witness replied, "Where are you calling from?" To which Angel stated, "Pay station on I-85." To which the witness replied, "You call me back in five minutes. I can't call you at the pay station."

MR. ASINOF. (continuing) And the witness testified that at that time he called the Solicitor, and that the Solicitor's wife answered the phone. That he told her he wanted to talk to the Solicitor, and she replied, "He's taking a shower," to which the witness replied, "I need to talk to him right quick." He testified that the Solicitor came to the phone, and the witness told him that he had received a call from Angel, and that they were loading that beer, to which the witness stated, "Meet me up there." The witness said, "I will be down there when you get there." The witness testified that he

told Angel — and Angel called him back — and the witness told him to watch this truck and see where it went.

MR. ASINOF. (continuing) Now, we move to exclude all of that testimony on the ground that it is a hearsay conversation had out of the presence of this defendant, and out of the presence of any of the defendants on trial in this case, and it is highly prejudicial, inadmissible, and made at a time that the defendant would not have had the opportunity to reply.

THE COURT. Anything —

MR. HAMES. We insist that it is admissible to explain acts, conduct, and motive, as it changes its character from hearsay to original evidence.

THE COURT. All right, sir. Motion to exclude that testimony is overruled.

MR. ASINOF. Your Honr please, we move the Court to exclude the evidence — that portion of the testimony of the witness of the State, Lt. Cleghorn, relating to a conversation between himself and the Sheriff and the Solicitor out of the presence of the defendant, A. C. Park, to the effect that the Solicitor stated, "I guess we will have to — " — and the Sheriff said, "I guess we will have to wait until the morning." "Everything is locked up — can't get nobody to the door." To which the witness replied, "I've got a key there in the trunk of that car that will unlock them beer doors with an axe."

MR. ASINOF. (continuing) Move to exclude that testimony on the grounds that it is hearsay and made by a party not a party in this case, and made out of the presence of the other defendants in this case.

THE COURT. All right, sir.

MR. HAMES. I am certain, Your Honor, this was offered for the purpose of proving acts, motive, and conduct, and its character changes from hearsay to original evidence.

THE COURT. This motion to exclude that evidence is also overruled.

MR. ASINOF. Your Honor please, we move to exclude from evidence that portion of the testimony of Lt. Cleghorn where he testified in response to Trooper Rawlings going to the yellow house where Rawlings asked him who lived up there, and the witness told him Albert Funderburk, and Rawlings then stated to the witness, "He is not up there. He's over yonder where that beer is." To which the witness replied, "Turn around then." On the ground that that testimony was hearsay, made out of the presence of the defendant, does not relate to any of the conspirators in this case alleged in the indictment of the defendant. Was not made in the presence of any of the defendants, and is therefore purely hearsay, and does not explain conduct, and is merely a narration of some conversation had out of the presence of the defendant, and is highly prejudicial.

MR. HAMES. That was offered as original evidence to explain acts, motives, and conduct.

THE COURT. This motion to exclude is also overruled.

MR. ASINOF. Your Honor please, we move the Court to exclude the portion of the testimony of Mr. Angel — Ronny Angel — a witness sworn on behalf of the State, to the effect that that witness testified in the affirmative to a question asked by the State as follows:

Question asked by the State was: "Then if he was doing that the eight times he was, you made purchases from him, was really on behalf of Mr. Park, wasn't it?" To which the witness replied, "Yes, it was."

MR. ASINOF. (continuing) We renew our motion to exclude that portion of the witness's testimony on the ground it was a conclusion on the part of the witness and inadmissible.

THE COURT. All right, sir.

MR. HAMES. It proves acts and conduct of those involved in the conspiracy, and the State having offered the evidence prima facie to establish the existence of the conspiracy.

THE COURT. This motion is also overruled — the motion to exclude overruled.

MR. ASINOF. We move to exclude that portion of the testimony of State's witness, Vernon Kidd, wherein he testified as follows: The witness was testifying as to a conversation had with Sheriff Perry outside of the presence of the defendant in this case, and the witness testified, "The conversation we had in part occurred, I believe, in the early part of '66 — one particular night in '66 — I don't know when it was — whether it was in February or March. He spoke to Smith and myself about the sale of some beer for two weeks of a person whose name I did not identify. He just said something about it."

MR. ASINOF. (continuing) Now, we move to exclude that testimony on the ground that it appears to have been a hearsay conversation had between the witness Kidd and the Sheriff out of the presence of this de-

fendant; it's not relating to anything to which the defendant would have had the opportunity to reply at that time, and is therefore hearsay and doesn't come within the exceptions to the hearsay rule and privileges.

MR. HAMES. The testimony of this witness was that Sheriff Perry came to him and asked him was he willing to make a deal for the sale of beer and, thereafter, this defendant came to him, and the testimony was also corroborated and supported by the testimony of the witness, Albert Funderburk, that he picked up seven to eight truckloads of beer from that place as a result of his conversation. It deals with a conspiracy during the course of the conspiracy of the acts, and conduct of this defendant, along with, through acts and conduct in concert with others.

THE COURT. This motion to exclude is also overruled.

MR. ASINOF. Move the Court to exclude that portion of the testimony of the witness, Lloyd Seay, witness for the State, and also a co-defendant in this case, wherein the witness was testifying of a conversation between the witness and another co-defendant, Douglas Pinion, to the effect that he had told Doug that the man that wanted to do it wanted $7,500 instead of $5,000, and he said that he would go see, and he didn't think that the man would pay any more than about 45, so the witness stayed an hour and Pinion came back and said "the old man" wouldn't go up any, but "I will put $500 on it and make it $5,500." We move to exclude that testimony on the ground that it was a hearsay statement made between the witness Seay and co-defendant Doug Pinion out of the presence of defendant Park, and that the State has at this time failed to connect that de-

fendant or this defendant Park with the conspiracy by a prima facie showing by evidence aliunde the statements of the alleged conspiracy, and therefore it would be hearsay and inadmissible and highly prejudicial, and we move to exclude it on those grounds.

THE COURT. Mr. Hames?

MR. HAMES. We insist the State has offered ample evidence that this defendant, A. C. (Cliff) Park, did along in action and concert with others cause, procure, aid and abet in the commission of the murder of Floyd Hoard. We submit that this is the testimony of one of the co-conspirators, the defendant on trial, made during the pendency of the conspiracy, and before a full disclosure and before the conspiracy had terminated. We insist it is admissible.

THE COURT. All right, sir. This motion to exclude is also overruled.

MR. ASINOF. Your Honor, we move to exclude that portion of the testimony of Lloyd Seay, a witness for the State, a co-defendant in this case, wherein the witness was testifying about a conversation he had had with one George Worley, in which Worley had led the witness to believe that if the witness didn't go through with it and didn't go along with it and help him that the "old man" would only get someone else to do it, and the witness would be the only one that knew about it other than them, on the ground that such statement, conversation, having been had out of the presence of the defendant, at a time when the State has failed to prove a prima facie showing that this defendant, A. C. (Cliff) Park was any part of such a conspiracy by evidence aliunde of the alleged conspirators; therefore, hearsay,

inadmissible, highly prejudicial, and should be stricken from the record, and we so move.

MR. HAMES. There was a statement made by one of the men charged in this bill of indictment along with the defendant on trial in the course of the conspiracy that the State has submitted ample evidence to prove made during the pendency of the conspiracy and before the same was terminated, and we submit that it is admissible.

THE COURT. This motion is also overruled.

MR. ASINOF. Your Honor please, during the trial of this case and in the testimony of the witness, Lloyd George Seay, a witness for the State, the following was testified to by him: Quote: "Yes, sir. As I stated, I can't remember the exact words, but he told me if I didn't go along with them that the old man would just get somebody else to do it, and I would be the only one that knew about it – that they knew about it – and after that he was killed by somebody else, if he were picked up he would be afraid I would talk or implicate him some way, and he would have something done to me or parts of my family, and that that could happen," close quotes – that portion of that testimony we now move to exclude on the ground that it related to a conversation had between the witness and one George Worley out of the presence of this defendant, and there has been no prima facie showing by the State of a conspiracy between the defendant Park and either one of the two parties to that conversation, and is therefore hearsay as to this defendant, not being present at the time it was made, and it's highly prejudicial to him, and inadmissible evidence and we so move to exclude that portion of the testimony.

MR. HAMES. There may be one or two words different from the previous motion, but I don't recognize them, and I present the same argument that it is admissible.

THE COURT. This motion to exclude is also overruled.

MR. ASINOF. During the testimony of Lloyd George Seay, a witness for the State and co-defendant in this case, the witness testified to the contents of a conversation that he had had with co-defendant Douglas Pinion, in which the witness testified in this language: "Yes, sir. He did. He said the old man was worried. That he kept asking him who done it, and Doug said he never did tell him. Said he might have messed up one time. Said he told him one time somebody from this city might have done it, and next time he told him a man from Detroit."

MR. ASINOF. (continuing) We move to exclude that portion of Mr. Seay's testimony on the ground that it now appears to have been a hearsay statement made by Pinion to Seay out of the presence of the defendant, A. C. (Cliff) Park, and the State has failed to prove a prima facie case of conspiracy linking A. C. (Cliff) Park to the conspiracy, and therefore as to him it's hearsay, binds only the persons who made it, and cannot be considered by the jury as evidence against this defendant, is highly prejudicial, and we move to exclude it on those grounds.

MR. HAMES. As counsel said that the testimony was to the effect that some man "in this city" did, and that's a misstatement of the record, and has not been testified to on the trial of this case.

MR. ASINOF. May it please Your Honor, if I may, I would like to ask that where I used the word "city" in quoting from the evidence, that I would like to substitute the word "county" – and strike the word "city." Apparently, it is a typographical error, and still urge the same objection. Excuse me; let me have a conference with counsel.

THE COURT. All right, sir.

MR. ASINOF. Your Honor please, if I may, let me strike that last statement – the word "city" – I would like to strike the word "city" – I would like to strike the word "county" from the record, in which I quoted the testimony of Mr. Seay, and substitute the word – name "Mississippi" – I think this was a typographical error on the part of the court reporter –

MR. HAMES. The word was "Mississippi."

MR. ASINOF. (continuing) "Mississippi" – that's what I had here, and apparently was a typographical error.

THE COURT. All right, sir.

MR. ASINOF. Let me rephrase the entire statement for the sake of clarity, and let me rephrase the part of the testimony we object to.

MR. HAMES. I don't think it's necessary, if the Court will consider the word "Mississippi" or name "Mississippi" and insert it in lieu of "this city." We all know what he is talking about.

MR. ASINOF. Well, it's not but three lines, Your Honor.

THE COURT. All right, sir. You may.

MR. ASINOF. (continuing) The testimony we are

objecting to is the testimony of Seay where he testified the following language, "Yes, sir; he did. He said the old man was worried; that he kept asking him who done it and Doug said he never did tell him. That he might have messed up one time; that he told him one time somebody from Mississippi had done it, and the next time he told him a man from Detroit" — close quotes — and that's the testimony that we object to on the grounds as previously stated.

THE COURT. All right, sir.

MR. HAMES. We submit that this was a statement made by one of the parties in the bill of indictment to a second party named in the bill of indictment concerning the defendant now on trial, his course of conduct. The State has fully established and from all of the evidence shows a conspiracy existed between those three and two additional people to kill Floyd Hoard. That it was made during the pendency of the conspiracy and prior to its termination, and therefore the acts and conduct of the co-conspirators are admissible as to this defendant now on trial.

THE COURT. This motion is also overruled.

MR. ASINOF. May it please the Court, we respectfully submit that during the trial of this case, the witness for the State, Mr. Ronny Angel, testified to a conversation had with Mr. Pinion, one of the co-defendants named in this bill of indictment, made after the death of Floyd Hoard, and out of the presence of this defendant, A. C. (Cliff) Park, in a motel room here in Jefferson in which the witness testified as follows: "I asked Mr. Pinion in response to this investigation if he would give me a statement as to his whereabouts the

night of August the 6th, the Sunday night. Mr. Pinion advised me that he was at his mother's residence; that he was there with his girl friend, Eugenia Smith, up until approximately 10:00 to 10:30 at night. He said that upon his girl friend leaving, he left the residence and went to Barrow County, Winder, Georgia, and did not return home until approximately 1:30 a.m. in the morning." Close quotations.

MR. ASINOF. (continuing) We move to exclude this portion of Mr. Angel's testimony on the ground that the same is hearsay. It is alleged declaration by an alleged conspirator made after the fact of the conspiracy had ended. It was not made in furtherance of the conspiracy. It was not made during its pendency. It is self-serving in itself, and it is therefore hearsay and made out of the presence of the defendant. It is highly prejudicial, irrelevant and immaterial, and that it is merely a narration of a past event concerning interviews with a person who has not testified as a witness in this case. It is not subject to being admitted under any rule of impeachment or under any rule of law, and is therefore hearsay and does not come within the exception of the hearsay rule, and so we move to rule that portion of the testimony out.

THE COURT. All right –

MR. HAMES. The State has submitted ample proof of the conspiracy existing between A. C. (Cliff) Park, the defendant on trial, Lloyd George Seay, George Iras Worley, J. H. Blackwell, and Douglas Pinion. This is a statement of Pinion that is offered by the State for the purpose of corroboration of the testimony of J. H. Blackwell, and the testimony of Lloyd Seay, in that they testi-

fied that when they arrived in the area they made their first foray to the premises of the late Solicitor, Floyd Hoard. That there was some confusion, and that Lloyd Seay left and went to a considerable distance and was gone for approximately forty-five minutes, and that Lloyd Seay testified that he made this foray to the home of Douglas Pinion. That Douglas Pinion was not at home at the time he arrived, and so it is offered for the purpose of corroboration of the testimony of Blackwell and Seay; is made in the furtherance of the conspiracy itself in all of its entire sequence, names and identities of the conspirators. It is made during the pendency of the conspiracy and is admissible and bonding, as a statement of a co-conspirator and declaration made by him upon this defendant here on trial.

CONCLUSION TO SEPARATE APPENDIX

The foregoing appendix consists of such pertinent quotations of specific portions of the record, with specific reference to the places in the record where the matter appears, as is contained on page 5 of the petition for certiorari under the heading of "Manner of Raising Federal Question."

WESLEY R. ASINOF
Attorney for Petitioner in Certiorari
3424 First National Bank Bldg.
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CERTIFICATE OF SERVICE

I, Wesley R. Asinof, a member of the Bar of the Supreme Court of the United States and Counsel for Petitioner in Certiorari in the above styled case do hereby certify that I have this day served copies of the foregoing Appendix To Petition for Certiorari upon counsel of record for the State of Georgia by depositing in the United States Mail Depository, with sufficient postage for first class prepaid mail one copy each to G. Wesley Channell, Solicitor General, Jackson County Courthouse, Jefferson, Georgia and to Hon. Arthur Bolton, Attorney General, care of State Judicial Building, Atlanta, Georgia, counsel for the State of Georgia.

This.....day of October, 1968.

WESLEY R. ASINOF

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FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 557

A. C. PARK,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Supreme Court of Georgia, as yet unreported officially, is appended to the petition.

JURISDICTION

The petition invokes the jurisdiction of this Court under 28 U.S.C. § 1257 (3). Respondent contends that such jurisdiction is non-existent in this particular case

for the reasons that (1) the judgment of the Supreme Court of Georgia is not a final judgment within the purview of the jurisdictional statute, and (2) the petitioner failed to raise a substantial federal question in the State courts.

QUESTIONS PRESENTED

1. Whether a statute of the State of Georgia (Ga. Code § 38-306 [1933]) which provides that after the fact of conspiracy is proven, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all, violates a defendant's federally-protected constitutional right to be confronted by the witnesses against him.

2. Whether a statute of the State of Georgia (Ga. Code § 38-302 [1933]) which permits the declarations of a co-conspirator offered as facts to explain conduct and motive to be admitted in evidence as original evidence deprives a defendant of due process of law.

STATUTES INVOLVED

Code of Georgia, § 38-302 (1933), which provided, as of the dates involved in this case, as follows:

> "When, in a legal investigation, information, conversations, letters and replies, and similar evidence are facts to explain conduct and ascertain motives, they shall be admitted in evidence, not as hearsay, but as original evidence."

Code of Georgia, § 38-306 (1933), which provided, as of the dates involved in this case, as follows:

> "After the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all.

ARGUMENT

I

THE DECISION OF THE SUPREME COURT OF GEORGIA IS NOT A FINAL JUDGMENT WITHIN THIS COURT'S JURISDICTIONAL REQUIREMENT AS TO FINALITY.

The petitioner seeks to call under review a decision of the Supreme Court of Georgia in which a judgment favorable to the petitioner was entered. This judgment had the effect of vacating the petitioner's conviction and sentence and contained, as directions upon remand, an order granting the petitioner a new trial. The petitioner complains of the failure of the Supreme Court of Georgia to base this favorable disposition of his appeal upon all of the several alternative grounds urged. This Court has always held that based upon its statutorily-defined jurisdiction, only "final judgments" of State courts are subject to its review. *Pope v. Atlantic Coast Line R.R.*, 345 U.S. 379, 381-2 (1953); *Gospel Army v. City of Los Angeles*, 331 U.S. 543 (1947). This limitation upon the Court's jurisdiction has been designed to exclude the exercise of the Court's jurisdiction in piecemeal proceedings calling for advisory opinions and premature adjudications of constitutional issues. *Pope v. Atlantic Coast Line R.R., supra.* "Were the reviewing power not limited to 'final judgments', litigants would be free to come here and seek a decision on federal questions which, after later proceedings, might subsequently prove to be unnecessary and irrelevant to a complete disposition of the litigation." *Ibid.*

Lack of finality of the instant judgment of the Supreme Court of Georgia may be demonstrated by refer-

ence to separate, alternative and overlapping chains of decision. Firstly, there are those decisions of this Court holding that the final judgment in a criminal proceeding is the sentence. *Parr v. United States,* 351 U.S. 513, 518 (1956); *Berman v. United States,* 302 U.S. 211, 212 (1937). Obviously, there is no sentence in the instant situation. Petitioner's conviction has been reversed and the proceedings against him have been remanded to the trial court for a new trial. Until such a new trial is held, and only if a conviction is therein secured, can the petitioner be sentenced for the offenses which have formed the basis of these proceedings. Secondly, there are those decisions of this Court which hold that where the effect of a State court's judgment is to grant a petitioner a new trial, the judgment will not be final. *Gospel Army v. City of Los Angeles, supra.* The rationale of this holding is based upon the rule that for a judgment of an appellate court to be final and reviewable, it must end the litigation by fully determining the rights of the parties, so that nothing remains to be done by the trial court, except the ministerial act of entering the judgment which the appellate court directed. *Gospel Army v. City of Los Angeles, supra; Department of Banking v. Pink,* 317 U.S. 264, 267-68 (1942). Clearly, the directions under which the Supreme Court of Georgia remanded the present case require more than merely ministerial action on the part of the trial court. A jury trial will be required. The disposition which a jury, not yet impaneled, will make of the matter cannot be predicted with any degree of certainty.

The fact that the decision of the Supreme Court of Georgia will be the law of the case is not relevant to the issue of finality. This Court is not bound by the law-

of-the-case rule on review of a case when, and if, it is appealed for the second time to the highest State court. See *Great Western Telegraph Co. v. Burnham*, 162 U.S. 339, 344-345 (1896).

II

THE PETITIONER FAILED TO RAISE A SUBSTANTIAL FEDERAL QUESTION IN THE SUPREME COURT OF GEORGIA.

As the petitioner candidly admits in his petition for a writ of certiorari, the federal question involved herein was first framed as such in the petitioner's motion for a rehearing. Throughout the briefs and argument, the petitioner's objections to certain allegedly hearsay declarations were argued upon strictly non-federal grounds. (Brief of the Appellant). For purposes of certiorari under 28 U.S.C. § 1257 (3), the validity of a State statute must have been "drawn in question" or a federal title, right, privilege or immunity must have been "specially set up or claimed." The statute contemplates the raising of a substantial federal question in the correct manner in order to give the State court to which the writ would be directed an opportunity to consider and pass upon the federal question. The substantial federal question, properly framed, must be raised at a proper point in the State-court proceeding. *Beck v. Washington*, 369 U.S. 541, 550-54 (1962). A petitioner must follow the State procedures in raising the federal question; any other "course would be disrespectful of the State's procedures." *Ferguson v. Georgia*, 365 U.S. 570, 572, n.1 (1961). It is a recognized rule of Georgia procedure that constitutional questions should be raised as soon as the matter comes to the attention of the complaining party

or his attorney. *Stone v. The State,* 202 Ga. 203 (1947). See also *R.O.A. Moters, Inc. v. Taylor,* 220 Ga. 125-27 (1964). The validity of reasonable State procedural rules circumscribing the raising in issue of constitutional questions has been recognized. *Beck v. Washington, supra; Williams v. Georgia,* 349 U.S. 375, 382-83 (1955); *Edelman v. California,* 344 U.S. 357, 358-59 (1953). In the instant case, the constitutional issue was first raised after a judgment of reversal granting the petitioner a new trial. Rule 43 (c) of the Rules of the Supreme Court of Georgia, as set out in the appendix hereto, provides only for the granting of a rehearing upon the motion of "the losing party." In view of this provision, the fact that the petitioner here was the prevailing party in the Supreme Court of Georgia, and the appearance for the first time of an issue affecting the constitutionality of a statute of the State of Georgia, it cannot be stated that the denial of a rehearing effected an adjudication of constitutionality. Rather, the denial of a rehearing should be read as a discretionary avoidance of a constitutional issue rendered premature by the grant of a new trial.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

ARTHUR K. BOLTON
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MARION O. GORDON
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MATHEW ROBINS
Assistant Attorney General

October 15, 1968

APPENDIX

Rules of the Supreme Court of the State of Georgia, adopted July 8, 1965.

XIV. REHEARING.

RULE 43. *Motion for rehearing, when and how made.* No motion for a rehearing will be considered by this Court unless the same is filed in the office of the clerk thereof during the term at which the judgment sought to be reviewed was rendered, and before the remittitur has been forwarded to the clerk of the trial court. An original and six copies will be sufficient.

(a) The court may by special order in any case direct that the remittitur be transmitted to the clerk of the trial court immediately after the rendition of the decision and judgment, or at any other time, without awaiting expiration of the usual period of ten days, and may otherwise by special order limit the time within which a motion for rehearing may be filed to any period less than ten days, counsel in such cases to be notified. Unless an extension of time is requested and granted, a motion for rehearing must in any event be filed within ten days from the rendition of the decision and judgment, regardless of whether the remittitur has been transmitted to the lower court.

(b) No motion for rehearing by the same party after a first motion has been denied will be filed except by special order of the court, although the clerk may receive any such later motion and deliver the same to the court for action.

(c) A hearing will be granted, on motion of the losing party, only when it appears that the court has over-

looked a material fact in the record, a statute, or a decision which is controlling as authority and which would require a different judgment from that rendered, or has erroneously construed or misapplied a provision of law or a controlling authority. No motion for a rehearing will be entertained which does not expressly point out what material fact in the record, or controlling statute or decision, has been overlooked by the court, or what provision of law or controlling authority has been erroneously construed or misapplied.

(d) There shall be attached to the motion a certificate of counsel that upon careful examination of the opinion of the court he believes that such a fact, statute, or decision, has been overlooked, or that such provision of law or controlling authority has been erroneously construed or misapplied. The motion, when filed, shall show that a copy thereof has been served on opposing counsel, who may thereupon file a brief on the questions raised.

(e) Upon the consideration of a motion for a rehearing, this court may, in its discretion and according to its power as heretofore exercised, revise the opinion or change the judgment, without granting a rehearing, in which event the court shall so advise the clerk as to the said revision or changes who shall then promptly notify counsel thereof.

(f) After motions for rehearing have been disposed of, or in the absence of such motion, the court or the Justices may revise opinions in accordance with Code § 6-1606.

(g) In so far as practicable, the provisions of this rule shall apply to cases certified to this court by the Court of Appeals, and to applications for certiorari.

CERTIFICATE OF SERVICE

I, MATHEW ROBINS, one of the Attorneys for the Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 23 day of October, 1968, I served a copy of the foregoing Brief for the Respondent in Opposition on the Petitioner by mailing a copy in a duly addressed envelope with postage prepaid to his counsel of Record, WESLEY R. ASINOF, 3424 First National Bank Building, Atlanta, Georgia 30303.

MATHEW ROBINS
Of Counsel for Respondent

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NUMBER 557

A. C. PARK,

Petitioner,

vs.

THE STATE OF GEORGIA,

Respondent.

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER

AUTHORITY TO FILE BRIEF

The supplemental brief is filed pursuant to the authority granted any party by Rule 24 (5) of this Court calling attention to new cases and other intervening matter not available at the time of filing the petition for certiorari.

NEW MATTER PRESENTED

On September 16, 1968, the United States Court of Appeals for the Fifth Circuit, in the case of

Evans v. Dutton, Warden,
No. 25348,

same not having been as yet reported, handed down a decision holding the Georgia statute, to-wit: Ga. Code Ann. 38-306, to be repugnant to the Sixth Amendment. A full and complete copy of such opinion is hereto set forth in Appendix A to this brief.

The appellee in *Evans v. Dutton* has filed a notice of appeal with the Clerk of the Court of Appeals for the Fifth Circuit, a copy of the letter from the Clerk of the Court of Appeals being hereto set forth in Appendix B hereto, and the original of such notice and certified record therein has been forwarded to the Clerk of the Supreme Court.

Thus, the decision of the Fifth Circuit in *Evans v. Dutton* is in irreconcilable conflict with the Georgia Supreme Court in the case at bar. If *Evans v. Dutton* is upheld on the appeal to this Court petitioner should have a remand or reversal of the judgment of the Georgia Supreme Court.

Petitioner respectfully submits that both this case and *Evans v. Dutton* should be considered together by this Court and thus resolve the serious conflict now existing between the Supreme Court of Georgia and the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 25348

ALEX S. EVANS,

Appellant,

VERSUS

A. L. DUTTON, Warden,
Georgia State Prison,
Reidsville, Georgia

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

(SEPTEMBER 16, 1968)

Before GEWIN and THORNBERRY, Circuit Judges, and EDENFIELD, District Judge.

GEWIN, Circuit Judge: A year and a half after three police officers were found shot to death in Gwinnett County, Georgia, appellant Evans was tried before a

jury and convicted of the murder of one of the officers. Since the jury did not recommend mercy, the Gwinnett County Superior Court sentenced him to die in the electric chair. Having exhausted his state remedies,[1] Evans filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Georgia, alleging that his conviction had been obtained in violation of his sixth and fourteenth amendment rights. The district court denied the petitioned relief and Evans has appealed to this court. We have determined that Evans was denied his sixth and fourteenth amendment right to be confronted by the witnesses against him. We therefore reverse the judgment of the district court.

This case was argued before this court with *Williams v. Dutton*[2] which was the appeal of an alleged co-conspirator of Evans. The revelant background facts are set forth in *Williams* and we will not repeat them here. In addition, most of the issues raised are common to both cases. Since we must reverse on the confrontation question, we do not reach Evans' other contentions.[3] However, we should point out that many of the same issues will arise upon the retrial of this case and, in the interest of sound judicial administration, we commend

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[1]The Georgia Supreme Court affirmed Evans' convictions, Evans v. State, 222 Ga. 392, 150 S.E.2d 240 (1960), and the United States Supreme Court denied his petition for a writ of certiorari. Evans v. Georgia, 385 U.S. 953 (1966).

[2]____ F.2d ____ (5th Cir. 1968) [No. 25349, August 20, 1968].

[3]The other contentions concern the availability and extent of discovery to a criminal defendant against the state; the qualification of jurors; the admissibility of the testimony of a witness who has been granted immunity from prosecution; and the availability of discovery in a federal habeas corpus proceeding.

a reference to the treatment in *Williams* of those constitutional questions.

The facts upon which Evans' sixth amendment contention rests are not in dispute. During Evans' trial a witness, one Shaw, testified that Williams had stated to him that "if it hadn't been for that dirty-son-of-a-bitch, Alex Evans, we wouldn't be in this now." According to Shaw, Williams made this statement the day after his arraignment in Gwinnett County on the murder charge and in response to Shaw's inquiry as to how Williams had made out in court. At the time of the alleged statement, both Williams and Shaw were serving sentences for unrelated crimes in the federal penitentiary in Atlanta, Georgia.[4]

Evans' counsel made a timely and vigorous objection to the statement attributed to Williams, arguing that

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[4]Shaw's testimony was somewhat incredible. He testified that Williams was talking to him in a normal voice through a ten-by-ten plate-glass window in a prison hospital door, while Williams was lying on a bed in the room and Shaw was standing in the hall. Shaw had stated in the Williams trial that the window was covered only by wire mesh. The fact that it was covered by a pane of plate glass was brought out in Evans' trial. Moreover, evidence was submitted but rejected by the trial court which tended to show that Shaw's testimony may have been compensation for a respite from the dull routine if prison life.

In spite of its basic incredibility, we are convinced that it cannot be called harmless. *See* Chapman v. California, 386 U.S. 18, 24 (1967): "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." In his dissenting opinion, Justice Quillian of the Georgia Supreme Court stated that Shaw's "testimony . . . obviously was prejudicial to the defendant." Evans v. State, 222 Ga. 392, 400, 150 S.E.2d 240, 251 (1966).

it was inadmissible under both state evidentiary law and the sixth amendment. The trial court overruled counsel's objection, holding the statement admissible in evidence under a Georgia statute which provides:

> After the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all.[5]

The Georgia Supreme Court upheld the ruling of the trial court, stating:

> The defendant [Evans], and his co-conspirator, Williams, at the time this statement was made, were still concealing their identity, keeping secret the fact that they had killed the deceased, if they had, and denying their guilt. There was evidence sufficient to establish a prima facie case of conspiracy to steal the automobile and the killing of the deceased by the conspirators while carrying out the conspiracy, and the statement by Williams made after the actual commission of the crime, but while the conspiracy continued was admissible.[6]

The confrontation clause of the sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In the early case of *Salinger v. United States* the Supreme Court stated:

> The right of confrontation did not originate with the provision in the 6th Amendment, but was a common-law right having recognized exceptions. The purpose of that provision, this court often has said, is to continue and preserve that right, and not to broaden it or disturb the exceptions.[7]

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[5]Ga. Code Ann. § 38-306 (1954 rev.).

[6]Evans v. State, 222 Ga. 392, 400, 150 S.E.2d 240, 248 (1966).

[7]272 U.S. 542, 548 (1926). *See* Dowdell v. United States, 221 U.S.

Thus the fact that the framers of the Constitution did not intend to exclude hearsay evidence appears to have been viewed as having ossified the rule as then developed. This is a regrettably shallow assessment of the wisdom and foresight of those responsible for the destiny of this nation.[8] But this view of the confrontation clause presented no difficulty so long as the clause was applicable only in the federal courts, because the confrontation-hearsay rule was then, for all practical purposes, a single principle in federal criminal cases.[9] History complicated the role of the federal judiciary, however, when the fourteenth amendment was adopted and the federal constitutional standard of due process of law was imposed upon the states. Since many of the rights and privileges embodied in the Bill of Rights had long been regarded as fundamental to any concept of ordered liberty, they were expectably enforced against the states under the due process clause of the fourteenth amendment.[10] The

325, 330 (1911); Kirby v. United States, 174 U.S. 47, 61 (1899); Robertson v. Baldwin, 165 U.S. 275, 281-82 (1897); Mattox v. United States, 156 U.S. 237, 243 (1895).

[8]*See* Frankfurter, *John Marshall and the Judicial Function*, 69 Harv. L. Rev. 217, 229 (1955): "No doubt, these provisions of the Constitution were not calculated to give permanent legal sanction merely to the social arrangements and beliefs of a particular epoch. Like all legal provisions without a fixed technical meaning, they are ambulant, adaptable to the changes of time. That is their strength. . . ."

[9]See cases cited in note 7 *supra*.

[10]*See*, e.g., Malloy v. Hogan, 378 U.S. 1 (1964) (fifth amendment privilege against self incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment right to counsel); Mapp v. Ohio, 367 U.S. 643 (1961) (fourth amendment right against unlawful search and seizure). *See generally* Henkin, *"Selective Incorporation" In the Fourteenth Amendment*, 73 Yale L.J. 74 (1963).

enforcement of the confrontation clause against the states now requires the application of a none-too-concrete standard to state hearsay rules which have experienced a various and even erratic evolution.[11] Thus the duty of this court is not only to interpret the framers' original concept in light of historical developments,[12] but also to translate into due-process terms the constitutional boundaries of the hearsay rule.[13]

In applying the confrontation clause to the states, the Court in *Pointer v. Texas* stated:

> It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case. . . . The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safe-guards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution.[14]

However, neither *Pointer* nor any subsequent decision adequately explains how and when a state hearsay rule exceeds permissible constitutional bounds. In spite of the Court's effusive language, the confrontation clause is certainly not violated merely because the defendant

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[11]McCormick, Evidence § 230 (1954).

[12]*See* Cardozo, The Nature of the Judicial Process 51-97 (1949).

[13]*But see* Note, *Confrontation and the Hearsay Rule*, 75 Yale L.J. 1434 (1966), in which the writer argues against this approach to the confrontation clause.

[14]380 U.S. 400, 404 (1965).

is not permitted to confront and cross-examine a witness against him. The Court has approved the admission, under a recognized exception to the hearsay rule, of a statement by a witness who is unavailable at the time of trial despite the fact that the right of confrontation is denied.[15] In explaining a previously recognized exception to the right of confrontation; the Court in *Barber v. Page* stated:

> It is true that there has traditionally been an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination. . . . This exception has been explained as arising from necessity and justified on the ground that the right of cross-examination initially afforded provides substantial compliance with the purposes behind the confrontation requirement.[16]

Generally but not unexceptionally, some evidence is better than none at all. Thus when rational substitutes for the benefits of confrontation actually exist, there is no reason to exclude hearsay evidence. Although we express no view as to the constitutional validity of any exception to the confrontation requirement which has not been ruled upon, it is important to point out that generally recognized exceptions to the hearsay rule have developed from a painful process of rationalizing the denial of confrontation.[17]

The Supreme Court has now made clear that the ra-

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[15]Pointer v. Texas, 380 U.S. 400, 407 (1965). *See* Bruton v. United States, 36 U.S.L.W. 4447, 4449 n.3 (U.S. May 20, 1968). Also see the pre-*Pointer* cases cited in note 7 *supra.*

[16]36 U.S.L.W. at 4330.

[17]*See* 5 Wigmore, Evidence §§ 1420-27 (3d ed. 1940).

tionale of hearsay exceptions in criminal cases must be continually scrutinized and reevaluated. In *Barber* the trial court had admitted in evidence the transcript of testimony given at a prior trial upon the prosecutor's showing that the witness was outside the state. According to the traditional view, the evidence was admissible because a witness outside the jurisdiction is beyond the compulsory process of the court.[18] The Supreme Court rejected this justification, stating:

> Whatever may have been the accuracy of that theory at one time, it is clear that at the present time increased cooperation between the States themselves and between the States and the Federal Government have largely deprived it of any continuing validity in the criminal law.[19]

We therefore think it clear that, if an accused is to be deprived of the right to confront and to be confronted by the witnesses against him, there must be salient and cogent reasons for the deprivation. A criminal defendant cannot, consistent with the confrontation clause, be convicted upon the testimony of phantom witnesses whose credibility is unknown and unknowable by the trier of fact.

Appellee in this case states that Evans "demonstrates a rather basic confusion" in contending that his right to confrontation was infringed because witness Shaw did in fact appear in court and testify. However, we think

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[18] *See* McCormick, Evidence § 234, 1954; 5 Wigmore, Evidence § 1404 (3d ed. 1940).

[19] 36 U.S.L.W. at 4330. The Court held that, unless the prosecutor has made a good-faith effort to secure the witness' presence at the trial and failed, the witness cannot be regarded as unavailable.

the confusion is appellee's. The testimony objected to was not Shaw's but that attributed by Shaw to Williams who was not in court and who did not testify. Appellee further argues that the Supreme Court authority cited by Evans involved *written* evidence and that those cases, therefore, do not control the *oral* statement involved here. Since appellee has shown no basis for justifying a different treatment of written and oral evidence, we reject the distinction as untenable.

We have searched in vain for a reason to justify the abridgment of the right to confrontation which obviously occurred in this case. Appellee merely points to Georgia's co-conspirator statute which, rather sphinx-like, answers all but the questions we ask. The admission in evidence of the statement attributed to Williams occurred in circumstances which offered no rational substitute for confrontation.[20] In *Douglas v. Alabama*[21] the state called as a witness against the defendant one Loyd, who had already been convicted on the same charge. When Loyd refused to answer questions, the prosecutor proceeded to read a confession, allegedly made by Loyd, which incriminated the defendant. As he read, the prosecutor would pause occasionally and ask Loyd if he had made the statement read, but Loyd refused to answer any questions. The Supreme Court held that the prosecutor's ventriloquistic performance had violated the defendant's sixth amendment right to confrontation. A

[20]Appellee has argued in his brief that the trend in the law today is to reject the hearsay rule "as a senseless anachronism." Whatever may be the trend of the law of evidence in civil and administrative proceedings, the trend of the criminal law is subject to a different set of circumstances, not the least of which is the sixth amendment.

[21]380 U.S. 415 (1965).

substantially similar attempt was made in this case to put words into the mouth of Williams who would doubtless have spit them out if he had testified.[22]

In support of the constitutional validity of the Georgia statute under which Williams' alleged statement was admitted, appellee argues that the statute is identical in principle to rules in both federal and state courts. Since the denial of confrontation in the present case is without rational justification, we need not consider the implications of a general judicial acceptance of such a rule. However, we should point out that the statute involved here, as interpreted by the Georgia Supreme Court, goes far beyond the traditional co-conspirator exception to the hearsay rule.[23] The crime had been committed well over a year before the statement was allegedly made. Moreover, all three of the alleged conspirators were at that time in prison serving sentences for other crimes. With all due respect to Georgia's highest tribunal, it is inconceivable that the statement attributed to Williams was made "during the pendency of the criminal proj-

[22]Since Williams pleaded not guilty and subsequently appealed his conviction, it is almost certain that he would have denied making the statement even if he had agreed to testify.

[23]*See, e.g.*, Fiswick v. United States, 329 U.S. 211, 216-17 (1946); 4 Wigmore, Evidence § 1079 (3d ed. 1940); Annot., 4 A.L.R.3d 684 (1965); 16 Ann. Jur.2d *Conspiracy* § 40 (1964).

ect."[24] The authorities relied upon by appellee[25] make clear that the recognized exception relates only to statements actually made while the criminal conspiracy remained alive.[26]

As construed by the Supreme Court of Georgia, the statutory co-conspirator exception to the hearsay rule authorizes practices repugnant to the sixth amendment under the facts and in the circumstances presented in this case. As applied in this case, the statute collides with Evans' sixth amendment right of confrontation. Since appellant Evans' right to confront the witnesses against him was infringed, it is clear that he is entitled to a new

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[24]The Georgia Supreme Court conceded that Williams' alleged statement was "made after the actual commission of the crime." Evans v. State, 222 Ga. 392, 397, 150 S.E.2d 240, 248 (1966). Additionally, contrary to the state court's finding that the co-conspirators were still concealing their identity, the appellee in his brief to this court admits that the statement attributed to Williams was "a statement which implicated Evans." In Fiswick v. United States, 329 U.S. 211, 217 (1946), the Supreme Court stated: "[C]onfession or admission by one co-conspirator after he has been apprehended is not in any sense a furtherance of the criminal enterprise. It is rather a frustration of it."

[25]Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 116-17 (1948); United States v. United States Gypsum Co., 333 U.S. 364, 393 (1948); Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 249 (1917); 31A C.J.S. *Evidence* § 362 (1964). Also see authorities cited in note 23 *supra*.

[26]We think it indicative of the evidentiary quality of the statement attributed to Williams that it would not, under generally recognized rules of evidence, have been admissible even if Williams had testified. We know of no rule of evidence which would permit a witness to testify to an incriminating extra-judicial statement made by him sometime in the past.

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trial within a reasonable time. Accordingly, the judgment of the district court is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office of the Clerk

October 15, 1968

Edward W. Wadsworth
Clerk

Room 408—400 Royal St.
New Orleans, La. 70130

Mr. Wesley R. Asinof
Attorney at Law
3424 First National Bank Bldg.
Atlanta, Georgia 30303

Re: No. 25348 — Alex S. Evans vs. A. L. Dutton

Dear Sir:

Your letter of October 9 has been referred to me for answering. This is to advise that the original of the notice of appeal filed by appellee has been forwarded to the Supreme Court together with the certified record in the referenced proceedings.

You may be able to obtain a copy from Mr. Evans at the state attorney general's office.

Very truly yours,

EDWARD W. WADSWORTH, Clerk
By: /s/ GEORGE BAUER
GEORGE BAUER
Deputy Clerk

GB/fcw

CERTIFICATE OF SERVICE

I, Wesley R. Asinof, a member of the Bar of the Supreme Court of the United States and Counsel for Petitioner in Certiorari in the above styled case do hereby certify that I have this day served copies of the foregoing Supplemental Brief upon counsel of record for the State of Georgia by depositing in the United States Mail Depository, with sufficient postage for first class prepaid mail one copy each to G. Wesley Channell, Solicitor General, Jackson County Courthouse, Jefferson, Georgia and to Hon. Arthur Bolton, Attorney General, care of State Judicial Building, Atlanta, Georgia, counsel for the State of Georgia.

This_____day of October, 1968.

_____

WESLEY R. ASINOF